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chase land gives an interest in the land to the person who has the option. *London & Southwestern Ry. v. Gwinn*, 20 Ch. Div. 562; *Peoples St. Ry. Co. v. Spencer*, *supra*.

Easton v. Montgomery, 90 Cal. 307, is in point with the present case. In that case the court said: "It is not necessary, however, that the vendor should be the absolute owner of the property at the time he enters into the agreement of sale. An equitable estate in the land, or a right to become the owner of the land, is as much the subject of sale as the land itself; and whenever one is so situated with reference to a tract of land that he can acquire the title thereto, either by the voluntary act of the parties holding the title, or by proceedings at law or in equity, he is in a position to make a valid agreement for the sale thereof."

Dresel v. Jordan, 104 Mass. 407, is one of the leading cases holding that the vendor need not have an absolute title. Says the court: "* * * if the obligation of the contract be mutual, and the seller is able in season to comply with its requirements on his part, to make good the title which he has undertaken to convey, we see no ground on which the purchaser ought to be permitted to excuse himself from its acceptance."

Since the holder of an option, given for a valuable consideration, which makes it irrevocable within the time specified, may by proper acceptance, compel a specific performance of the title to him, it would seem that he has a right to contract for the sale of the land. Within a reasonable time he may comply with the contract of sale, and therefore, such a sale would be valid. Surely in this country where the real estate business is so uncertain and where land values fluctuate so rapidly, it would work an injustice to hold that no one could make a valid contract for the sale of land until the absolute title is vested in him.

WATERS AND WATER-COURSES—OWNER'S RIGHTS TO PERCOLATING
WATER.

The New Jersey Court of Appeals in reversing the holding of the Supreme Court of that state in the case of *Meeker v. City of East Orange*, 70 Atl. 360, not only deviated from the rule long adhered to in that state but also rejects the English rule as to property rights in percolating underground waters.

The plaintiff owned a farm in what is known as Canoe Brook Valley which he used in his dairy business as pasture land for his stock. Two brooks ran through the farm which also contained a spring, the water of which was used for drinking purposes. His cattle in the pasture had for years resorted to the brooks for drinking water. The City of East Orange, under the authority of a statute, acquired a tract of 680 acres situated in Canoe Brook Valley, above the plaintiff's farm, and installed thereon a water plant of 20 artesian wells. A few years prior to the commencement of this action the city began to pump from the wells and it had thus taken water, which, but for its interception, would have reached the plaintiff's spring or stream. No water other than percolating has been taken and in this action the plaintiff seeks damages for the diversion of such water which otherwise would have reached his spring and for the injury to the land caused thereby.

The lower court held that a city has an absolute right to appropriate all percolating waters found beneath the land owned by it and to use the water for purposes entirely unconnected with the beneficial use and enjoyment of that land, to the extent, indeed, of merchandising the water and supplying it to the inhabitants of East Orange. The judgment was based on the theory that the owner of land has an absolute right to all waters found beneath the land and that the diversion from the plaintiff's land was *damnum absque injuria*.

The subject involved in the case is one of comparatively recent development in our law, the first time it was discussed being in the case of *Hammond v. Hall*, 10 Sim. 552 (1840); but that case was not directly on the point so that Chief Baron Pollock says: "That the distinction between underground waters and those which flow upon the surface was first made in England in *Acton v. Blundell*, 12 M. & W. 324, decided in 1843. *Dickinson v. Canal Co.*, 7 Exch. at 300. Chief Justice Tindal in that case approved and adopted the maxim of the Roman law that: "If one digging on his own land, in good faith and with no purpose of injuring his neighbor, nevertheless dries up his well by diverting the underground currents from it, there is no remedy."

The question was again considered in *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282; *Broadbent v. Ramsbotham*, 11 Exch. 602; but the doctrine of *Acton v. Blundell*, *supra*, was not

essentially modified. The point finally came up before the House of Lords in the case of *Chesemore v. Richards*, 7 H. L. Cas. 349 (1856), where it was held that the owner of the land has an absolute ownership of the waters found under it and may do with them as he pleases. This decision has been treated as finally settling the law for England on this question and has been followed and approved in numerous subsequent English cases.

Thus it is seen that the doctrine of *reasonable use* does not exist as to percolating waters in England, but Lord Wensleydale in *Chasemore v. Richards*, *supra*, says: "That according to reason and law it seems right to hold that a land owner ought to exercise his right to use percolating waters in a reasonable manner with as little injury to his neighbor's rights as may be." And he suggests it is not reasonable to pump water from a well to supply a municipal corporation at a distance.

In speaking of the English cases on this subject, Mr. Farnham in his recent comprehensive work on *Waters and Water Rights*, Vol. III, p. 2718, says: "When it is remembered that the first English case dealing with percolating waters arose in 1840, and that it was not decided that a land owner might exhaust the water to furnish a municipal water supply until 1860, it will be at once seen that there was no common law on the subject when the American states put the common law into statute and hence, the opinions of the American courts as to what is the common law on this subject are as good as the English. Therefore, in any case the question can be decided upon its merits, giving to the English cases the weight their reasoning entitles them to, but without the necessity of regarding them as binding precedents."

Bearing this in mind let us look for a moment at the American authorities on this subject.

The first case in this country in which the question of owner's rights in percolating water was involved was that of *Greenleaf v. Francis*, 18 Pick. (Mass.) 117, decided in 1836, seven years before *Acton v. Blundell*, *supra*, the leading English case. It was there decided "that the owner of the soil may dig a well on any part of his land which he desires. It is a lawful act and although it may be prejudicial to the plaintiff it is *damnum absque injuria*." This case, however, is not inconsistent with the doctrine of reasonable use. In the case of *Frazier v. Brown*, 12

Ohio St. 294, the court says: "That in the absence of express contract and positive legislation, as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to underground water percolating or filtering through the earth." In *Miller v. Black Rock*, 99 Va. 747, it is held that "percolating waters which have no known or defined course are said to form a part of the realty with the absolute right of use and appropriation by the owner of the land." Holding that the owner of the land has an absolute right to the use of percolating waters, provided that he does not act maliciously, may be cited, the cases of *Taylor v. Welch*, 6 Ore. 198; *Metcalf v. Nelson*, 8 S. D. 87; *Wheatley v. Baugh*, 25 Pa. St. 528; *Roath v. Driscoll*, 20 Conn. 533; *Delhi v. Youmans*, 50 Barb., (N. Y.) 316; *Emporia v. Soden*, 25 Kan. 588, and *Washburn on Easements*, Sect. 353.

Summing up it may be stated as a general rule that the owner of the soil may intercept and divert percolating waters without incurring liability to owners of land in the neighborhood through whose lands the water so diverted would have percolated, and this is true notwithstanding the fact that the consequence of his act in so diverting or intercepting the water would be to injure or even render entirely worthless another's well, spring, or surface water course. This is stating the rule positively and broadly but such statement is upheld by the cases cited.

But the rule above stated has been subject to qualifications and it is with these qualifications that we must now deal and see to what extent the absolute ownership has been modified.

The Minnesota court qualified the rule at an early date by holding that "a land owner has no right, except for the benefit and improvement of his own premises, or for his beneficial use to drain, collect, or divert percolating water thereon, where such act will destroy or materially injure the spring of another, and that he cannot divert such waters for the sole purpose of wasting them." *Stillwater Water Co. v. Farmers*, 89 Minn. 58. The Wisconsin court held *contra* to this in *Huber v. Merkel*, 117 Wis. 355; but Prof. Farnham in a note to 64 L. R. A. 236, says that "this case is opposed to good morals, good sense, and all common law principles."

Then the New York courts have deviated from the former strict rule and in *Smith v. Brooklyn*, 18 Hun. (N. Y.) 340, they

held "that the owner of land cannot gather the water by pumps that it may be carried to a distant place for use or sale in a case where the inevitable result would be to destroy a spring upon the land of an adjoining owner." This has been followed consistently, and in *Forbell v. New York*, 164 N. Y. 522, acting on the suggestion of Lord Wensleydale mentioned before, they held "that to fit up wells with pumps of such pervasive and potential power that from their base they tap the water stored in the plaintiff's land and in all the region thereabout and lead it to his own land and by merchandising it prevent its return is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and others whose lands are impaired." The California courts in *Katz v. Walkinshaw*, 141 Cal. 116, make substantially the same holding.

The Vermont court in *Chatfield v. Wilson*, 28 Vt. 49, held that "the owner of land may make any use whatever of the percolating waters no matter by what motive he is induced, and that the presence of malice makes no difference." But this case stands alone on this phase of the question, the overwhelming weight of authority being *contra*. *Greenleaf v. Francis*, *supra*; *Wheatley v. Baugh*, *supra*, and *Roath v. Driscoll*, *supra*.

The first case in which a doubt was expressed as to the soundness of the reasoning of the English cases and the one in which the doctrine of reasonable use was enunciated was that of *Bassett v. Salisbury*, 43 N. H. 569, in which, after a long and well reasoned argument, the conclusion was reached that "owners of land are liable to the owners of adjoining lands for injuries done by the obstruction of percolating water unless such obstruction was caused by them in a reasonable use of their own privileges and rights." This case was later affirmed in *Swett v. Cutts*, 50 N. H. 439.

The Massachusetts courts have turned from their strict construction of the rule and have indicated, particularly in *Hart v. Jamica*, 133 Mass. 488, that they follow and agree with the reasoning of the New Hampshire courts. In *Cohen v. Canada Land Co.*, 142 Cal. 437, the California court held, "that the owner of land has a right to make only a reasonable use of the water percolating therein for the benefit and enjoyment of his land;" and in *Haldeman v. Bruckhart*, 45 Pa. St. 514, the Pennsylvania court

said that "the right to use the percolating waters cannot be exercised in an unreasonable, negligent, or malicious manner to the injury of the land owners in the vicinity." The same doctrine has been applied to an artesian basin in Minnesota, the court saying that "the law of correlative rights applies to the use, by adjoining land owners, of waters drawn from an artesian basin and such proprietors must so use their wells as not to unreasonably injure their neighbors." *Erickson v. Crookston Water Co.*, 100 Minn. 481. The following cases sustaining or tending to sustain this doctrine of reasonable use may be cited: *Barclay v. Abraham*, 121 Iowa 619, 64 L. R. A. 236, and note; *Reisert v. New York*, 174 N. Y. 196; *Gognon v. French Lick*, 163 Ind. 687; *Katz v. Walkinshaw*, 141 Cal. 116, and *Pence v. Carney*, 58 W. Va. 296.

In 10 *American and English Decisions in Equity*, 704, issued in 1905, it is stated that "it may be said to be now the generally accepted doctrine in the United States that the rights of the owners of soil to percolating waters are limited to a use for proper purposes connected with the natural enjoyment of their property. According to the best considered cases the early doctrine must be limited so as to permit only a reasonable use of the percolating waters underlying the land." And in a note to *Katz v. Walkinshaw*, 64 L. R. A. 236, it is said: "The New Hampshire doctrine is the only one which can be recognized. The mere fact that the source and course of the water is unknown is no reason why the courts should refuse to apply to such waters definite rules so far as it is possible to apply them, and in actual practice the application of rules recognizing correlative rights and confining each land owner to a reasonable use of the percolating water is not difficult."

Can it be said in these days of powerful machinery and modern appliances, where it is possible for one owner to deprive the lands of the neighborhood of this underground water and thus render the land practically worthless, that percolating waters are wholly without the protection of the law, that they, like wild animals, belong alone to him who first obtains possession of them?

From the trend of modern decisions, from the justice of the rule, and from the clear concise reasoning through which it ar-

rives at its opinion, it would seem that the New Jersey court was right in adopting the doctrine of reasonable use in percolating water and rejecting that of absolute ownership.

RIGHT OF MINISTERIAL OFFICER TO QUESTION CONSTITUTIONALITY
OF A LAW IN MANDAMUS PROCEEDING.

In a recent case, *State ex rel., University of Utah v. Condland et al., State Board of Land Commissioners*, reported in 104 Pac. 285, the Supreme Court of Utah decided that when an officer, though acting ministerially, is directly responsible for his official acts, he may attack a statute directing him to act, as unconstitutional, and upon that ground justify his refusal in a *mandamus* proceeding. The point in consideration came up on an application to the court by which the University of Utah prayed a mandate against the State Board of Land Commissioners to compel said board to comply with the provisions of a certain act. The commissioners refusing to act, justified their non-compliance by pleading the unconstitutionality of the law under which the mandate was prayed.

The following cases support their contention: In *Van Horn v. State ex rel., Abbott*, 46 Neb. 62, it was stated: "As the Constitution is our fundamental law, an act of the legislature repugnant thereto is not only voidable but absolutely void and of no effect whatever. The officers of the state are sworn to support the Constitution, so where a supposed act of the legislature and the Constitution conflict, the Constitution must be obeyed and the statute disregarded. Ministerial officers are therefore not bound to obey an unconstitutional statute, and the courts, sworn to support the Constitution, will not by *mandamus* compel them to do so." *Marbury v. Madison*, 1 Cranch (U. S.) 137 (1803), holds that courts as well as other departments are bound by the Constitution. *Norman v. Kentucky Board of Examiners*, 93 Ky. 537, held that "although an officer cannot rightfully refuse obedience to a law if it be *prima facie* regular and valid, for it would be against public policy for him to do so, yet a court will not compel him to obey a law when it is unconstitutional and void." In the opinion of one of the judges, it was said: "It is not only a right but a duty of such a ministerial officer (auditor in this case) to contest the constitutionality of the law." The last opinion is supported by *Smith v. Broderick*, 107 Cal. 644.